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Supreme Court, U.S.
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No. 04-1318

In the

Supreme Court of the United States

State of MONTANA,
Petitioner,

v.

Tanya Marie ANYAN, ET AL.,
Respondents.

On a Petition for Writ of Certiorari to the Supreme Court of Montana

BRIEF OF THE STATES OF ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, OHIO, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(Restated)

1. Is the Montana Supreme Court's "divide and conquer" approach to reasonable suspicion irreconcilable with the flexible totality-of-the-circumstances analysis required by this Court's decisions?

2. Is the Montana Supreme Court's hindsight-based analysis of reasonable suspicion irreconcilable with this Court's decisions requiring deference to police officers' on-the-spot judgments?

3. Does the Montana Supreme Court's decision ignore the unique dangers posed by methamphetamine labs?

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INTEREST OF AMICI CURIAE

At issue in this case is the constitutionality of a no-knock search of a suspected methamphetamine lab. Amici, all of whom are grappling with the onset of the methamphetamine scourge, support the State of Montana's petition for certiorari to remedy the Montana Supreme Court's disregard for this Court's settled Fourth Amendment precedent.[1] In assessing whether police officers had reasonable suspicion to justify a no-knock entry, the state court turned a blind eye to this Court's longstanding totality-of-the-circumstances analysis in favor of the very "divide-and-conquer" approach recently condemned in *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Arvizu*, 534 U.S. 266 (2002). This Court should grant the petition and set the case for argument or, quite possibly, summarily reverse.

STATEMENT OF THE CASE

Given the nature of the question presented – whether the court below impermissibly ignored the "totality of the circumstances" in assessing the validity of the police officers' no-knock entry – a complete factual picture is necessary.

In late May 2000, Officer Christopher Nichols of the Thompson Falls, Montana, Police Department began investigating suspected illegal drug activity in a local

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[1] As in *Michigan v. Long*, 463 U.S. 1032, 1038-44 (1983), the Montana Supreme Court's conclusory statement that the no-knock entry violated the Montana Constitution does not create an "adequate and independent" state ground that would preclude review of its Fourth Amendment analysis. This issue is addressed at some length in the Petition. *See* Pet. at 22-24.

rental house. Officer Nichols determined that its occupants were operating a clandestine methamphetamine laboratory. Based on information indicating a large number of occupants in the house, on July 11, 2000, Officer Nichols requested assistance from the SWAT team in neighboring Kalispell, Montana. When team leader Sergeant Allen Bardwell learned that the three-story house was occupied by as many as 15 individuals, he contacted the Flathead County Sheriff's Department SWAT team, led by Undersheriff Chuck Curry, for additional assistance.

Officer Nichols shared with Sergeant Bardwell and Undersheriff Curry the information he had accumulated: Of several vehicles displaying Washington state license plates that were regularly observed at the rental house, one was registered to Respondent Troy Klein - one of several persons renting and occupying the house. Although Klein passed himself off as "Shawn Peterson" to local officers and citizens, Officer Nichols had identified Klein and learned that he had been charged previously with drug offenses in Spokane County, Washington. On speaking to Washington authorities, Officer Nichols had learned that Klein had three outstanding arrest warrants in Washington State, that he was in violation of his probation, and that he had been charged previously with unlawful possession of a firearm. Officer Nichols had also discovered that Nichols had recently purchased ammunition at a local hardware store, which led him to believe that Klein and/or the other occupants of the house possessed weapons.

Officer Nichols had also learned that at least six other occupants of - or frequent visitors to - the rental house had criminal backgrounds involving violence, including felony assault, domestic assault, intimidation with a weapon, carrying a concealed weapon, and unlawful

imprisonment. During one visit to the house, Officer Nichols had observed a surveillance camera monitoring the outside of the house; nighttime patrols confirmed that the house stayed illuminated throughout the evening. These circumstances created concern that the occupants would receive advance notice of any police approach and arm themselves, barricade the doors, or destroy evidence before a search warrant could be executed.

Sergeant Bardwell, in particular, thought that the use of a surveillance system indicated a "substantial [methamphetamine] operation." Based on the volatile nature of the elements used to make methamphetamine (of which more below, *see infra*, at 17-20), Officer Nichols was concerned about the possibility of an explosion if the occupants attempted hurriedly to dismantle the meth lab.

Nichols, Bardwell, and Curry discussed their concerns and the potential hazards facing the officers involved in executing a search warrant. Given the risks, the three agreed that a no-knock entry would best ensure the officers' safety. The plan involved a swift, well-manned entry by the SWAT teams to ensure that the occupants could not destroy the laboratory or other evidence (purposefully or otherwise) and to thwart any violent response to the officers' presence.

Officer Nichols obtained a warrant[2] from the trial court to search the rental house for evidence of the meth

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[2] The Montana Supreme Court took issue with the officers' failure to obtain advance approval for a no-knock entry; however, no-knock warrants are not statutorily authorized in Montana. Regardless, the absence of advance permission does not affect the officers' "authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant [was] being executed." *Richards v. Wisconsin*, 520 U.S. 385, 396 n.7 (1997).

lab, and the officers agreed to execute the warrant at 4:00 a.m. the next morning. The officers then placed the rental house under surveillance and monitored activity from an upstairs bedroom window located in a house across the street. Officers involved in the search arrived at the Thompson Falls Police Department around midnight for a briefing. Roughly two hours later, at 2:20 a.m., Officer Shawna Reinschmidt reported to Officer Nichols that Klein's vehicle had left the house five minutes earlier and that when the driver returned, he had climbed out of the car and ordered everyone to go inside the house and to turn off the lights. Immediately thereafter, Officer Reinschmidt observed movement inside the kitchen and around the house. Officer Nichols - interpreting the information to mean that the occupants had learned about the out-of-town SWAT teams and were destroying evidence and/or preparing for the search - advanced the search to 3:00 a.m.

The Kalispell SWAT team reached the top floor of the house on an outside stairwell and used a steel ram to break the doorjamb. Simultaneously, the Flathead SWAT team - which, on approach, had observed a second surveillance camera mounted on a tripod near the carport and entry door - entered the ground floor through an open doorway. The six occupants of the house, including Respondents Anyan, Cleveland, and Klein, were arrested, removed from the house, and decontaminated. Officers from the Criminal Investigation Division of the Montana Department of Justice then entered the house to collect evidence, disassemble the meth lab, and decontaminate the area.

Respondents moved to suppress the fruits of the search on the ground that the officers' no-knock entry violated the Fourth Amendment. Based on testimony from Bardwell, Curry, and Reinschmidt, as well as a

deposition given by Officer Nichols, exhibits, and the court file, the trial court denied the motions. During the evidentiary hearing, all of the parties cited to and relied on *Richards v. Wisconsin*, 520 U.S. 385 (1997). In its written order, the court – applying the "reasonable suspicion" standard set out in *Richards* – concluded that the totality of the circumstances known to the officers at the time they executed the warrant, justified their actions. The court emphasized the officers' belief that knocking and announcing their presence would be either dangerous or futile, or that it would inhibit the effective investigation of the crime by permitting the destruction of evidence. It found that the facts and circumstances known to the officers – including (i) the presence of surveillance cameras, (ii) the presence of firearms in the house, (iii) the potential for violence during execution of the warrant, (iv) the size of the house and number of occupants, (v) the presence of a fugitive felon, and (vi) the presence of a volatile and hazardous meth lab – warranted a no-knock entry.

In a 4-3 decision, the Supreme Court of Montana reversed. Rather than considering the totality of the circumstances known to the officers, the majority sorted the various circumstances into three distinct categories and found that, *standing alone*, none provided reasonable suspicion to support a no-knock entry. *State v. Anyan*, 104 P.3d 511, 516-20, 521-24 (Mont. 2004). Referring to the first set of circumstances as "safety concerns," the majority dismissed evidence indicating that occupants with serious criminal backgrounds were in possession of firearms and ammunition as "generalized fears." *Id.* at 521-23. It also casually discounted the danger created by the meth lab, pointing to the officers' failure to evacuate nearby homes and the absence of detectable resistance to law enforcement or information indicating the

destruction of evidence. *Id.* at 523. Under the second heading, "futility," the majority portrayed facts related to the occupants' counter-surveillance as essentially immaterial to the planning and execution of the search and ruled that the security equipment did not justify a no-knock entry. *Id.* at 523-24. In its final category, "destruction of evidence," the majority treated the potential disassembly and destruction of the meth lab as irrelevant to the officers' decision to make a no-knock entry. *Id.* at 524. Because, the court said, a large quantity of drugs would be nearly impossible to destroy in the short amount of time between the initial knock and entry, a no-knock entry was not warranted. *Id.*

Based on its rejection of each of the pigeonholed circumstances, and criticism of the officers' failure to craft an announced entry to counter the known exigencies, the majority concluded that the no-knock entry violated the Fourth Amendment. *Id.* at 520, 525. In its conclusion, the majority specifically rejected the contention that *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Ramirez*, 523 U.S. 65 (1998), required it to evaluate the circumstances bearing on reasonable suspicion holistically and "synergistically." *Id.* at 525-26.

The three dissenting justices, viewing the evidence under the reasonableness standard set out in *Richards*, found that the circumstances, as characterized by the officers at the evidentiary hearing, and taken as a whole, warranted a no-knock entry. Relying on the reasonable suspicion standard as applied in *Richards*, *Banks*, and *United States v. Arvizu*, 534 U.S. 266 (2002), the dissent contended (quoting *Arvizu* itself) that the majority's "divide-and-conquer analysis" was contrary to the "totality of circumstances" test delineated by this Court. 104 P.3d at 528-32.

SUMMARY OF ARGUMENT

When evaluating alleged Fourth Amendment violations, this Court has consistently assessed law enforcement officers' actions in light of *all* of the facts and circumstances known to them at that time. The Montana Supreme Court rejected that holistic review in favor of the very type of factor-by-factor approach this Court condemned in *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Arvizu*, 534 U.S. 266 (2002). Using its dissociative analysis, the state court here invalidated a no-knock entry of a three-story rental house that was used as a clandestine meth lab and that was occupied by people with serious criminal backgrounds who were both armed and likely alerted to the officers' presence. The state court's decision is flatly contrary to this Court's Fourth Amendment precedent – including *Banks*, *Arvizu*, and *Richards v. Wisconsin*, 520 U.S. 385 (1997) – stating that reasonable suspicion is to be determined through a flexible, holistic, realistic review of all of the circumstances known to the officers carrying out a law enforcement function. Given the starkness of the conflict, this Court should consider summary reversal.

REASONS FOR GRANTING THE PETITION

I. The Montana Supreme Court's "Divide and Conquer" Analysis Is Irreconcilable With the Flexible Totality-of-the-Circumstances Analysis Required by This Court's Decisions.

With all respect to the Montana Supreme Court, its decision here warrants summary reversal. In the teeth of this Court's decisions in *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Arvizu*, 534 U.S. 266 (2002) – both of which require a holistic, totality-of-the-

circumstances approach to reasonable suspicion – a majority of the Montana court considered each of several exigent circumstances in isolation to conclude that inadequate evidence existed to support the officers' no-knock entry. Indeed, the majority specifically rejected the dissent's appeal to apply this Court's "totality of the circumstances" test and, in its place, opted for a formalistic factor-by-factor approach. Because, as we will show, the Montana court's analysis cannot be squared with *Banks*, *Arvizu*, or other Fourth Amendment precedent, this Court should summarily reverse (or, at least, grant the petition to set matters straight regarding *Arvizu* and *Banks*).

1. The practice of treating "reasonableness as a function of the facts of cases," *Banks*, 540 U.S. at 35-36, naturally lends itself to a totality-of-the-circumstances review. Accordingly, this Court decisively rejected the Ninth Circuit's rulings in *Arvizu* and *Banks*, in which that court had judged reasonable suspicion by compartmentalizing and categorizing facts rather than by examining them holistically. Because the Montana court here seems to have taken a page out of the Ninth Circuit's *Arvizu/Banks* playbook, a careful examination of those cases is necessary.

Arvizu involved an officer's stop of an automobile later discovered to contain nearly 130 pounds of marijuana. The question there – much as here – was whether the officer had reasonable suspicion to make the stop consistent with the Fourth Amendment. *Arvizu*, 534 U.S. at 266. The district court said yes, but the Ninth Circuit reversed. *Id.* The Ninth Circuit found that a "fact-specific weighing of circumstances" created "'a troubling degree of uncertainty and unpredictability'" in Fourth Amendment analysis and instead opted to "delimit" those factors that should be "considered by law

enforcement officers in making stops." *Id.* After compiling a list of 10 factors, the court weighed each in turn and held that seven of them "carried little or no weight in the reasonable-suspicion calculus." *Id.* The court then determined that the remaining factors were inadequate to justify the stop. *Id.*

On certiorari, this Court reversed. Reiterating the totality-of-the-circumstances test that governs reasonable suspicion inquiries and the deference due to law enforcement officers' in-the-field judgments, this Court found that "the approach taken by the Court of Appeals ... depart[ed] sharply from the teachings of [its totality-of-the-circumstances] cases." *Id.* at 273-74. Such an "evaluation and rejection" of factors "in isolation from each other," this Court emphasized, conflicted with precedent that "preclude[d] this sort of divide-and-conquer analysis." *Id.* at 274-75. Law enforcement officers, this Court continued, are permitted to rely on their knowledge and experience in assessing the facts to find that the circumstances warrant further inspection. *Id.* at 275-76. After criticizing the Ninth Circuit for "casually rejecting" facts that when considered cumulatively led to a logical inference of illegal activity, this Court found that, upon giving the "totality of the circumstances ... due weight[,]" the officer possessed reasonable suspicion to conduct the traffic stop. *Id.* at 276-77.

Notwithstanding the unequivocal rejection of its formalistic analysis in *Arvizu*, the Ninth Circuit made essentially the same fundamental error in *Banks*. At issue there was whether officers' 15-20 second delay between knocking and entering a suspected drug dealer's apartment violated the Fourth Amendment. The district court (again) denied the motion to suppress, but the Ninth Circuit (again) reversed. *Banks*, 540 U.S. at 33-34. This time, the court of appeals created four categories of

entries under which to judge the reasonableness of a delay. *Id.* Ultimately, the court concluded that no exigent circumstances existed to justify destroying property to gain entry into Banks's apartment. *Id.* at 34-35.

This Court (again) rejected the Ninth Circuit's formalistic approach. Reasonableness, this Court reiterated, is "a function of the facts of cases" and thus necessarily requires a court to consider the totality of the circumstances. *Id.* at 35-36. A contrary approach – pigeonholing facts into distinct categories – would inevitably "giv[e] short shrift to details that turn out to be important in a given instances, and ... inflat[e] marginal ones." *Id.* at 36. After concluding that the officers possessed reasonable suspicion to justify their swift entrance, *id.* at 37-40, this Court condemned the Ninth Circuit's "four-part scheme for vetting knock-and-announce entries" on two grounds. *Id.* at 41. First, the Court noted that it had rejected a similar "attempt to subdivide felony cases" based on the level of exigency in *United States v. Ramirez*, 523 U.S. 65 (1998). *Banks*, 540 U.S. at 41-42. Second, the Court said, the Ninth Circuit had simply failed to come to grips with the earlier reversal in *Arvizu*. In *Banks*, "as in *Arvizu*, the Court of Appeals's overlay of a categorical scheme on the general reasonableness analysis threaten[ed] to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes." *Id.* at 42 (citing *Arvizu*, 534 U.S. at 274).

Arvizu and *Banks* do not stand alone. By contrast, this Court's cases have consistently and unmistakably rejected the notion that exigent circumstances are to be reviewed in isolation in determining Fourth Amendment reasonableness. Time and again, this Court has held that reasonableness is determined through considering the total circumstances known to the officers carrying out a

law enforcement function. *See Ramirez*, 523 U.S. at 71-72 (applying the reasonableness standard to a no-knock entry that resulted in the destruction of property); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (allowing a search of spaces adjacent to the location of an in-home arrest when the police reasonably suspect a risk of danger); *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (approving search of a vehicle for weapons based on "specific and articulable facts" and the "rational inferences" drawn therefrom); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (reviewing all the facts considered by an officer in surmising that an individual is armed and dangerous to justify a limited protective patdown). Particularly relevant here - a case involving no-knock entries - this Court has held that "law enforcement interests may ... establish the reasonableness of an unannounced entry." *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). And, indeed, reaching the issue at debate here, this Court has specifically approved a no-knock entry when the cumulative facts established that law enforcement possessed a reasonable belief that the defendant would destroy drug evidence. *Richards v. Wisconsin*, 520 U.S. 385, 395-96 (1997).

Seemingly ignoring all of these decisions - *Arvizu* and *Banks* most prominently - the Montana court parsed, discounted, and eliminated factors that, in its view, did not *alone* justify a no-knock entry (even if, taken together, they may well have supported the entry). First, the majority discarded information indicating that the occupants possessed firearms and had criminal backgrounds, writing it off as nothing more than "generalized fears." *State v. Anyan*, 104 P.3d 511, 522-23 (Mont. 2004). Second, it rejected the officers' concerns about the "inherent dangers in methamphetamine labs" and found that the threat could be avoided by evacuating

nearby residences. Based on its position, the court concluded – contrary to the clear record evidence – that the lab was not a significant factor in devising how to execute the warrant. *Id.* at 523, 524. Third, the court discounted the officers' concerns about safe entry into the residence by pointing to evidence that the occupants had hurriedly retreated into an intentionally darkened rental house which thereafter remained ominously quiet. *Id.* Fourth, it downplayed the use of surveillance equipment on the basis that law enforcement had planned for that contingency in its approach route. *Id.* at 524. Finally, the majority dismissed concerns over evidence destruction based on its generalization that it was practically impossible to destroy and dispose of materials generated by substantial drug operations. *Id.*

By engaging in the prohibited "divide-and-conquer analysis," *Arvizu*, 534 U.S. at 274, the Montana court here – like the Ninth Circuit before it – "seriously undercut the 'totality of the circumstances' principle which governs the existence *vel non* of 'reasonable suspicion.'" *Id.* at 275.

2. The Montana court's *analysis*, therefore, cannot be squared with the holistic totality-of-the-circumstances approach to reasonable suspicion embraced by this Court in *Arvizu*, *Banks*, and their predecessors. Once a proper analysis is undertaken, the *result* here becomes equally unjustifiable. Indeed, a forthright discussion of the cumulative facts known to the officers leads unmistakably to the conclusion that the officers had ample reasonable suspicion to justify a no-knock entry.

Consider the full picture: Law enforcement officers faced the quandary of how safely to enter a three-story rental house being used as a meth lab. The house was occupied by as many as fifteen individuals, at least six of whom had violent criminal backgrounds. Respondent Troy Klein, a renter and occupant of the house, had been

convicted of drug offenses, had three outstanding warrants in Washington State, and was in violation of his probation. Additionally, Klein had previously been charged with unlawful possession of a firearm and had purchased ammunition from a local hardware store. Six other known occupants of the rental house also had criminal backgrounds, including convictions for felony assault, domestic assault, intimidation with a weapon, carrying a concealed weapon, and unlawful imprisonment. These facts – together – led authorities to believe that Klein, and possibly other occupants, could be armed at the time a search warrant was executed.

In addition, the police knew that the occupants had installed a surveillance camera to monitor the outside of the house. Its presence created two concerns. First, because the house remained lit at all hours, the camera would alert occupants to the police presence and thereby allow them to barricade entry points, arm themselves, and destroy evidence. Second, the camera led authorities to believe that the meth lab constituted a "substantial operation" and, therefore, involved large quantities of meth ingredients. The volatile nature of those ingredients, *see infra* at 17-20, risked an explosion and resulting contamination if the laboratory were hurriedly disassembled.

Finally, after obtaining a warrant, but approximately two hours before its planned execution, an individual driving Klein's vehicle left the house and then, less than five minutes later, returned and loudly ordered its occupants to go inside and to turn off the lights. His action indicated that the occupants were alerted to the impending search and provided additional concerns that the occupants would either attempt to disassemble the lab quickly or undertake measures to impede, if not altogether thwart, entry into the rental house – or both.

Given the facts known to the officers here, this case follows *a fortiori* from *Richards*, in which this Court sustained a no-knock entry. There, the suspect was given mere minutes to assess and react to the presence of law enforcement. 520 U.S. at 395-96. Here, the occupants had anticipated and apparently readied themselves for a search. Thus, the officers faced the likelihood that they would be detected on approach to the house and that the occupants would seek to prevent efforts to enter. These facts created a real concern for officer safety (both that the officers could face a gun battle and that an explosion could result from a hurried dismantling of the laboratory), as well as reason to believe that evidence (both the precursor materials and the laboratory itself) could be destroyed. Under such circumstances, the officers possessed more than ample suspicion to justify a no-knock entry. *See Richards*, 520 U.S. at 388-89 (affirming a no-knock entry when the defendant had identified a police presence and would willingly destroy the drug evidence); *see also Banks*, 540 U.S. at 33, 38-40 (approving a short delay between announcement and entry when the defendant could quickly flush away drug evidence); *Ker v. State of California*, 374 U.S. 23, 25-29, 40 (1963) (finding "that justification for the officers' failure to give notice [was] uniquely present" when facts indicated the defendant possessed readily disposable narcotics and had already exhibited furtive conduct).

II. The Montana Supreme Court's Hindsight-Based Analysis Is Irreconcilable With This Court's Decisions Requiring Deference to Police Officers' On-the-Spot Judgments.

Binding (and nearly on-point) case law aside, the Montana court's decision here cannot be squared with real life. Police officers are human beings and, like other

human beings, assimilate *all* information available to them in making judgments. They cannot and do not compartmentalize and disaggregate information into discrete categories - *e.g.*, safety, futility, destruction of evidence. By engaging in that sort of stilted analysis - and, in essence, by faulting the officers for not engaging in that sort of stilted analysis, the Montana court ignored the way the human brain works. And because judgments about probable cause, reasonable suspicion, and the like are necessarily and appropriately tied to factual judgments made by *real* police officers doing *real* police work in the *real* world, the Montana court's analysis also ignores the way the Fourth Amendment works. This Court has repeatedly and correctly emphasized the importance of giving the benefit of the doubt to officers when they make on-the-spot judgments in the hurly-burly of day-to-day police work. Just a few examples:

- *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (according "due weight" to how a "police officer views ... facts through the lens of his police experience and expertise");
- *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.");
- *United States v. Ortiz*, 422 U.S. 891, 897 (1975) ("[O]fficers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers.");
- *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("In all situations the officer is entitled to

assess the facts in light of his experience in detecting illegal entry and smuggling."); and

- *Terry v. Ohio*, 392 U.S. 1, 27 (1968) ("[D]ue weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

Reviewing facts in isolation and out of context impermissibly ignores the practical realities faced by officers when making split-second judgments in the field. *See Ramirez*, 523 U.S. at 71 n.2 ("determining the lawfulness of entry" based on "what the officers had reason to believe *at the time of their entry*") (citing *Ker*, 374 U.S. at 40-41). The Montana court's dissociative analysis would impose unreasonable constraints on officers' ability to act on - and react to - their perceptions and intuitions as well as cold, hard facts acquired during the course of an investigation. It is, as this Court has said, for the very reason that reasonable suspicion deals "not with hard certainties, but with probabilities," *Cortez*, 449 U.S. at 418, that deference to officers' specialized knowledge and experience is appropriate. The Montana court's refusal to take the officers' perspectives into account cannot be justified - either under this Court's case law or under common sense.

III. The Montana Supreme Court's Decision Ignores the Unique Dangers Posed by Methamphetamine Labs.

Methamphetamine production is an exploding facet of the illicit drug industry. *See* National Drug Intelligence Center, *California Northern and Eastern Districts Drug Threat Assessment* (Jan. 2001), *at* http://www.usdoj.gov/ndic/pubs/653/meth.htm (discussing the precipitous rise in methamphetamine use and production); The National Methamphetamine Drug Conference, *Workgroup* 4

Clandestine Labs: Protecting the Environment and Community, at http://www.ncjrs.org/ondcppubs/publications/drugfact/methconf/appen-b4.html (growth in meth labs). In addition to the usual concerns that officers face when executing a search (*e.g.*, the presence of weapons), officers facing the meth scourge must take into consideration new threats created by the volatile precursor chemicals used in the production of meth and the side effects often suffered by participants in the production process.

To begin with, the chemicals used for the production of meth are extremely volatile and combustible and, accordingly, create dangers of fire, poisoning, and intentional or unintentional explosion. *See* P. Warner et al., *The Methamphetamine Burn Patient*, Journal of Burn Care & Rehabilitation, Sept./Oct. 2003, at 275 (noting that the combustible nature of several production ingredients "lead[] to an increased incidence of methamphetamine laboratory explosions"); The National Methamphetamine Drug Conference, *supra* (in 1995, approximately one in six meth labs resulted in an explosion and detailing the dangers of fire and explosion caused by the production process); Statement of Armand McClintock Before the House Committee on Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources, Fighting Methamphetamine in the Heartland: How Can the Federal Govern State and Local Efforts? (Feb. 6, 2004), *at* http://www.usdoj.gov/dea/pubs/cngrtest/ct020604.htm (the El Paso area alone suffered 19 meth-induced fires and explosions in 2001, 35 in 2002, and 21 in 2003).

To make matters worse, many meth labs are "mom and pop" shops. They "are not laboratories in the purest sense; they are 'bucket' chemistry, literally." The National Methamphetamine Drug Conference, *supra*. In those "labs," novices are combining what may appear at a

glance to be innocuous ingredients when, in fact, many of the chemicals involved in making meth are quite dangerous in their own right. *See* Statement of Armand McClintock, *supra* ("cooks" at small labs "are generally less experienced and have little regard for the consequences arising from the use of . . . chemicals"); Paul Morris, Case Notes, *Fouse v. State: The Arkansas Nighttime Search Rules – Helping Make Arkansas the Country's Number One Producer of Methamphetamine*, 53 Ark L. Rev. 965, 978 (2000) ("Smaller labs are usually more dangerous than larger operations because the cooks are generally less experienced chemists who often have little regard for the safety issues that arise when dealing with explosive and poisonous chemicals.").

The point for present purposes is that a knock on the door followed by a "Police!" announcement will alarm those inside. That may at times be a good thing, but not here. Alerted to the officers' inevitable entry and seizure of incriminating evidence, culpable parties will hastily attempt to dispose of ingredients or dismantle the lab. One wrong combination of chemicals could result in a fire or an explosion (as apparently happens fairly frequently, if El Paso's experience is at all indicative, *see supra*). And, indeed, those more well-schooled in the chemistry of meth could intentionally harm entering officers. An experienced "cook," deviously aware of the chemical cocktail available to him, could turn the laboratory into a virtual time bomb. *See* Morris, *supra* at 978 (suggesting a "booby trap" scenario available to an experienced meth producer). All of this is simply to say that where, as here, notice will only make matters worse, officers should be given discretion to assess the situation and decide whether surprise is the best option. The Montana court's formalistic decision has the effect of denying them that flexibility.

There is another problem. Meth users (and, to some degree even producers who might not actually use) pose a unique threat to law enforcement. Methamphetamine is a "powerful stimulant that affects the central nervous system" and produces irrational and sometimes violent behavior. *See* National Drug Intelligence Center, *supra* (explaining the sundry side effects of methamphetamine); *see also* The National Methamphetamine Drug Conference, *supra* (chemicals used in the production process create "potent compounds" comprised of "metal and sulfite agents and solvents ... that can enter the [central nervous system] and cause neural damage"). Meth can induce paranoia, hallucinations, and delusions, *see* National Drug Intelligence Center, *supra*, all of which can contribute to aggressive resistance to a search or ensuing arrest. In one case, a man believed to be taking methamphetamine and "acting paranoid" shot and killed a police officer when he attempted an arrest. *See id.* (citing April 14, 2000, *San Francisco Chronicle*). The point, again, is simply that users and even non-user producers of meth are particularly prone to irrational, violent behavior. In some cases, advance notice by police of a search, however slight, would only heighten the lab operators' paranoia and anxiety. If these meth labs are to be taken down effectively and with minimal risk (to all involved) surprise may sometimes be necessary.

Given these unique concerns, numerous courts have approved no-knock entries of meth labs both supported by, *see United States v. Streeter*, 907 F.2d 781, 789 (8th Cir. 1990), and in the absence of, *see People v. Messina*, 212 Cal. Rptr. 75, 80 (Cal. Ct. App. 1985), search warrants. In one case, the Oregon Court of Appeals went so far as to hold that "a working methamphetamine lab" is itself "an exigent circumstance." *State v. Chapman*, 813 P.2d 557, 561 (1991). In the light of the array of dangers posed by meth

labs, officers should be given leeway in determining how best to approach and search them. *See United States v. Musa*, No. 03-3343, 2005 WL 639707, at *3-6 (10th Cir. Mar. 21, 2005) (approving a no-knock entry where police were aware that defendant was dealing methamphetamine and his prior arrests indicated a violent temperament); *United States v. Hernandez*, 252 F. Supp. 2d 1190, 1191-93 (D. Kan. 2003) (upholding a no-knock entry where the defendant had a criminal history involving illegal possession of firearms and was suspected of producing methamphetamine). Again, without justification either in law or in logic, the Montana court denies officers that discretion.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and summarily reverse, or, alternatively, set the case for a hearing on the merits.

Respectfully submitted,

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